IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 104 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-
and
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

ELECON ENGG. CO. LTD.

Appearance:

1. INCOME TAX REFERENCE No. 104 of 1992

MR MANISH R BHATT for Petitioner No. 1

MR BD KARIA for MR RK PATEL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 28/08/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This is a reference, at the instance of the Commissioner of Income Tax, and the Income Tax Appellate

Tribunal, Ahmedabad Bench 'C' has referred the following questions under Section 256(1) of the Income Tax Act, 1961 (for short 'the Act') :

"(1) Whether, in law and on facts the difference between the w.d.v. and the market value of the cars given to the employees was to be treated as a perquisite for working out the disallowance u/s. 40A(5)/40(c)?

(2) Whether, in law and on facts the Tribunal was right in upholding the deletion of the sum of Rs.52,72,845/- paid as technical design fee to M/s.Weserhutte A.G. West Germany ?"

2. The Assessment Year is 1982-83 and the relevant accounting period is calender year ended 31-12-1981.

3. Heard Mr.M.R.Bhatt, learned sr. standing counsel on behalf of the applicant - revenue and Mr.B.D.Karia, learned advocate appearing on behalf of the respondent assessee.

4. It is common ground between the parties that the second question referred to us stands concluded by an unreported decision of this Court dated 18-01-2001 rendered in I.T.R. No.49 of 1988 pertaining to Assessment Year 1981-82 in the assesse's own case. In the circumstances, it is not necessary to set out facts and contentions in detail. Suffice it to state that the payment as technical design fee for the year under consideration is third installment while the first two installments had come up for consideration in the earlier year. In the earlier year it has been held by this Court that

"..... we find that know-how was acquired by the assessee on behalf of another Company by the name of Negveli Lignite Corporation. This Company had paid the assessee Company for this know-how and the assessee had further paid the amount to the German Company. The know-how was never utilized by the assessee. Therefore, in our view, the assessee is entitled to the allowance of Rs.1,12,30,810/- being payments as technical design fees to foreign collaborators. Question No.2 is answered in the affirmative i.e. in favour of the assessee and against the revenue."

5. Following the aforesaid finding we answer

question No.2 in the affirmative i.e. in favour of the assessee and against the revenue.

6. So far as question No.1 is concerned, it is noted by the assessing officer that certain employees of the assessee - Company had been given Fiat cars having w.d.v. of Rs.12,103/= each. The assessing officer estimated the market price of the cars in the year 1981 at Rs.30,203/= and treated the difference of Rs.18,000/= per employee as perquisite while working out the disallowance under Section 40A(5)/40(c) of the Act. The assessee carried the matter in appeal and the C.I.T. (Appeals) deleted the addition on the basis of the decision of special Bench of the Tribunal in the case of KODAK LIMITED Vs. I.A.C., [1986] 18 ITD 213 (Bom) (SB). The appeal of the revenue before the Tribunal failed and hence, the present question.

7. Section 40(c), as is relevant for the present, reads as under :

Amounts not deductible.

40. Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) x x x x x

(b) x x x x x

(c) in the case of any company--

(i) any expenditure which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director or to a person who has a substantial interest in the company or to a relative of the director or of such person, as the case may be,

(ii) any expenditure or allowance in respect of any assets of the company used by any person referred to in sub-clause (i) either wholly or partly for his own purposes or benefit,

if in the opinion of the Income-tax Officer any such expenditure or allowance as is mentioned in sub-clauses (i) and (ii) is excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom, [so, however, that the deduction in respect of the aggregate of such expenditure and allowance in respect of any one person referred to in sub-clause (i) shall, in no case exceed - "

8. Similarly, Section 40A(5) as is relevant for the present reads as under :

"[Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".

(5)(a) Where the assessee --

(i) incurs any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an employee either wholly or partly for his own purposes or benefit,

then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in clause(c) shall not be allowed as a deduction:

Provided that where the assessee is a company, so much of the aggregate of--

(a) the expenditure and allowance referred to in sub-clauses (i) and (ii) of this clause; and

(b) the expenditure and allowance referred to in sub-clauses (i) and (ii) of clause (c) of section 40,

in respect of an employee or a former employee, being a director or a person who has a substantial interest in the company or a relative of the director or of such person, as is in excess of the sum of seventy-two thousand rupees, shall in no case be allowed as a deduction. "

9. Therefore, on a plain reading of the aforesaid provisions it is apparent that under the said sections while computing income chargeable under the head "Profits and gains of business or profession" certain amounts shall not be deducted. However, what is material is that such disallowance has to be of an expenditure incurred by the Company. Only after an expenditure is incurred by the Company and the Company claims a deduction of such expenditure while computing its income from profits and gains from business that the assessing officer will be in a position to exercise his discretionary power to disallow certain portion of the expenditure. For the present controversy, it is not necessary to enter into the discussion as to whether such expenditure would result directly or indirectly in providing remuneration or benefit or amenity to a director, or employee or other persons mentioned in the provision. The pre-requisite condition is incurring of an expenditure.

10. In the present case, admittedly, the assessee Company has not incurred any expenditure. All that has happened is that certain cars belonging to the assessee company have been given away at w.d.v. to the employees. The assessee company has not incurred any expenditure. The assessing officer estimated the market value of the cars and has worked out the difference as perquisite in hands of the employees and disallowed the same by invoking Section 40A(5)/40(c) of the Act. The C.I.T. (Appeals) and the Tribunal have rightly deleted the addition. The section specifically requires incurring of expenditure and thereafter determining as to whether it amounts to a perquisite / benefit, etc. and then disallowance of the stipulated percentage within the aggregate limit specified in the section. There being no expenditure in the present case the said provision cannot be invoked and no disallowance in the form of addition

can be made. Furthermore, it is pertinent to note that there is no provision by which the assessing officer can substitute the sale price at which the cars were given away by the company to the employees. In these circumstances, we do not find any reason to interfere with the order of the Tribunal. We are supported in the view that we have taken by a decision of the Calcutta High Court in the case of COMMISSIONER OF INCOME-TAX V. BRITANNIA INDUSTRIES LTD. [1992] 198 I.T.R. 225.

11. Question No.1, therefore, requires to be answered in the negative i.e. in favour of the assessee and against the revenue.

12. The reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-

[D.H.WAGHELA, J] [D.A.MEHTA, J]

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